Supreme Court, U.S.
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No. 88-1333

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

NANCY ROBINSON
Petitioner,

vs.

COMMONWEALTH OF PENNSYLVANIA
Respondent.

On Appeal from the Order of the Supreme Court of Pennsylvania dated November 29, 1988, denying Petitioner's Petition for Allowance of Appeal

BRIEF FOR RESPONDENT

H. STANLEY REBERT*
District Attorney
York County Court House
28 East Market Street
York, Pennsylvania 17401
(717) 771-9600
Attorney for Respondent

*Counsel of Record

COUNTERSTATEMENT OF QUESTIONS FOR REVIEW

1. DOES THE FIRST ISSUE RAISED BY PETITIONER IN HER PETITION FOR A WRIT OF CERTIORARI FAIL TO PRESENT A FEDERAL QUESTION PURSUANT TO RULE 17 OF THE RULES OF THE SUPREME COURT SUCH THAT IT IS WITHOUT THE JURISDICTION OF YOUR HONORABLE COURT?

2. DOES THE SECOND ISSUE RAISED BY PETITIONER IN HER PETITION FOR A WRIT OF CERTIORARI FAIL TO PRESENT A FEDERAL QUESTION PURSUANT TO RULE 17 OF THE RULES OF THE SUPREME COURT?

3. DOES THE THIRD ISSUE RAISED BY PETITIONER IN HER PETITION FOR A WRIT OF CERTIORARI FAIL TO PRESENT A FEDERAL QUESTION PURSUANT TO RULE 17 OF THE RULES OF THE SUPREME COURT SUCH THAT IT IS WITHOUT THE JURISDICTION OF YOUR HONORABLE COURT?

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JURISDICTION

The jurisdiction of the Court is invoked under Title 28, United States Code, Section 1257 (a) which reads, in pertinent part:

> Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari . . . where any title, right, privilege, or immunity is specially set up or claimed under the Constitution.

STATUTES INVOLVED

The constitutional provision here involved is the Fourteenth Amendment, Section One of the United States Constitution, which provides, in pertinent part:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Rules of the Supreme Court of the United States, Rule 17 (1) (b) and (c) which state:

> (1) A review on writ of certiorari is not a matter of right , but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.
>
> (b) When a state court of last resort has decided a Federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.
>
> (c) When a state court or federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this court.

STATEMENT OF THE CASE

In a complaint dated October 2, 1985, the Petitioner, Nancy Robinson, was charged with the offense of Criminal Homicide for the alleged slaying of her husband, Anthony Robinson, on September 28, 1985, at their residence at 1775 Hillock Lane, Spring Garden Township, York County, Pennsylvania. Mr. Robinson had been shot five times with a .38 caliber pistol and had suffered multiple blunt trauma to the head. The immediate cause of death was exsanguination due to the injuries caused by the gunshot wounds. Both the murder weapon and a bottle of Asti Spumanti, believed to have caused the blunt trauma, were found at the scene, on the person of the Defendant and smashed on the floor of the garage, respectively. Police responded to the scene at approximately 4:20 a.m.

On Friday, October 11, 1985, a preliminary hearing was held before District Justice Jack Barton at which time it was determined that the Commonwealth had made a prima facie case and the matter was bound over for action by the Court of Common Pleas of York County. The Defendant waived arraignment on November 7, 1985, at which time she entered a plea of not guilty and requested trial by jury. The trial was scheduled for the January 1986 term of criminal court. Omnibus Motions for Pre-Trial relief were filed and refused. The case was tried before the Honorable John T. Miller and a jury during the May 1986 term of criminal court, at which time Defendant was adjudged guilty of Murder of the Third Degree.Timely Post-Verdict Motions were filed by Defendant. These motions were refused and an order of sentence imposed. Defendant appealed from this judgment of sentence to the Superior Court of Pennsylvania. The Superior Court issued an opinion dated June 3, 1988, in which it affirmed the judgment of sentence. Defendant's Petition for Allowance of Appeal to the Supreme Court of Pennsylvania was refused in an order dated November 29, 1988. The Defendant's Petition for Certiorari to the United States Supreme Court is now before your Honorable Court for disposition.

ARGUMENT

I.-III. THE PETITIONER HAS FAILED TO PRESENT AN IMPORTANT QUESTION OF FEDERAL LAW.

During his closing argument to the jury, the District Attorney said "I submit to you, ladies and gentlemen, that Mrs. Robinson has something to explain here, and her explanation leaves much to be desired." Defense counsel objected at that point and the trial court stated that it would give a curative instruction. At the conclusion of the court's instructions, the court requested that counsel offer for his consideration any additional instructions. None were forthcoming and no objections or exceptions to the court's charge as given were noted.

The Superior Court of Pennsylvania, in affirming the trial court, relied on Dilliplane v. Lehigh Trust Company, 457 Pa. 255, 322 A.2d 114 (1974). In Dilliplane, the court held that where trial counsel had neither offered a point for charge nor taken specific exception to the court's instructions as given, he could not preserve the issue for appeal. The situation in Dilliplane, where no instruction was offered and no exception by defense counsel was noted, is precisely the situation in the instant case. The Defendant cites Sandstrone v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L. Ed,2d 39 (1979) in support of her argument that the District Attorney's remark shifted the burden of proof to the defendant, in violation of her constitutional rights. Sandstrone is clearly distinguishable, in that it was the court's instruction and not the District Attorney's single statement in closing, which might have been interpreted as shifting the burden of persuasion as to the requisite mental state of the defendant. Furthermore, the judge instructed the jury that it must follow the law as he sets it forth, but that counsel's arguments are not to be taken as facts.

Defendant also cites Lynk v. LaPorte, 789 F.2d 544 (Seventh Circuit 1986) for the proposition that she, like the defendant therein, has been stymied by a technical state procedural ruling from which she cannot appeal.

However, in Lynk, the appellant was in prison and unable to obtain a divorce because of his inability to be present at a mandatory hearing. The Court recognized that in Lynk, no final judgment has been or is likely ever to be entered. In Lynk, the "stymied" litigant is permitted to appeal to the Supreme Court because he has had no opportunity to have his case heard elsewhere based on a procedural ruling. The defendant's situation in this case bears no resemblance to that in Lynk. She has had the opportunity for post-verdict motions and direct appeal.

Since neither of these cases is on point, the defendant has failed to show a state court holding in conflict with such other holdings of this or any other federal court as set forth in Rule 17 such that your Honorable Court should grant petitioner's Petition for a Writ of Certiorari.

Petitioner also asserts that her constitutional rights were abridged by the Superior Court's refusal to address her post-verdict motions regarding the verdict. Petitioner, at the time of post-verdict motions, argued that the verdict was both contrary to the evidence and the law. The Superior Court dismissed those two particular motions pursuant to well-settled caselaw in Pennsylvania that post-verdict motions which allege traditional "boilerplate" phrases without any further argument are not sufficient to preserve those issues for appellate review. Commonwealth v. Manigault, 501 Pa. 506, 462 A.2d 239 (1983); Commonwealth v. Cieri, 346 Pa. Super. 77, 499 A.2d 317 (1985); Commonwealth v. Holmes, 315 Pa. Super. 256, 461 A. 2d 1268 (1983).

Petitioner cites Johnson v. Mississippi, _____ U.S. _____, 108 S.Ct 1981, 100 L.Ed.2d 575 (1988), in which this Court said that an inconsistently recognized procedural bar applied by the state appellate court in that case did not establish an adequate and independent state ground to support the decision and, therefore, this Court would consider the claim on certiorari. Johnson is completely inapposite to the instant case. There, the accused was sentenced to death by a Mississippi trial court and was procedurally barred under Mississippi law from appealing. In that case, the appellant's death sentence was imposed using a prior New York felony conviction as an aggravating circumstance when, in fact, that felony conviction had been overturned in New York. The Mississippi Appellate Court held that Appellant was procedurally barred from appealing the sentence because he did not attack the validity of the New York conviction on direct appeal. This Court found that the Mississippi Appellate Court's conclusion was not an adequate and independent state ground for affirming the conviction. This Court said that for it to be precluded from reviewing a state procedural rule, that rule must be strictly or regularly followed. Henry v. Mississippi, 379 U.S. 443, 13 L.Ed.2d 408, 85 S.Ct. 564 (1965). In that case, this Court found that Mississippi had not applied the rule consistently or regularly.

Here, on the contrary, Pennsylvania's rule that boilerplate post-verdict motions, without further elaboration, fail to preserve the issue for appellate review has been consistently and regularly applied. See Commonwealth v. MacSherry, 371 Pa. Super. 164, 537 A.2d 871 (1988); Commonwealth v. Hawthorne, 346 Pa. Super. 125 527 A.2d 559 (1987); Commonwealth v. Burchard, 349 Pa. Super. 456, 503 A.2d 936 (1986); Commonwealth v. Beckman, 349 Pa. Super. 430, 503, A.2d 443 (1986); Commonwealth v. Jackson, 336 Pa. Super. 486,485 A.2d 1186 (1984);

Commonwealth v. Santana, 321 Pa. Super. 299, 468 A.2d 488 (1983). Petitioner cannot legitimately argue that this holding has not been regularly or consistently applied.

Petitioner's second issue, therefore, fails to present the type of federal question which, under Rule 17 of the United States Supreme Court rules, would warrant your Honorable Court's granting of certiorari.

Petitioner has failed to cite any authority in support of her third issue. Furthermore, Petitioner has neither alleged that Pennsylvania's law on after-discovered evidence is, in itself, unconstitutional or that, in her particular case, it was improperly applied. Accordingly, Petitioner has again failed to present a federal question deserving this Court's review under Rule 17.

For the aforementioned reasons, the Commonwealth of Pennsylvania respectfully requests that this Court dismiss Nancy Robinson's Petition for a Writ of Certiorari.

Respectfully submitted,

H. STANLEY REBERT
DISTRICT ATTORNEY
YORK COUNTY COURT HOUSE
28 EAST MARKET STREET
YORK, PENNSYLVANIA 17401
ATTORNEY FOR RESPONDENT